(5)

Supreme Court, U.S.
FILED
MAY 28 1998
CLERK

No. 97-7213

In The

Supreme Court of the United States

October Term, 1997

SYLVESTER MOSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER SYLVESTER MOSLEY

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

RICHARD COUGHLIN
DONALD J. MCCAULEY*
Federal Public Defender
District of New Jersey
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347

Counsel for Petitioner Sylvester Mosley

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

33 pp

QUESTION PRESENTED

Whether bank larceny in violation of 18 U.S.C. § 2113(b), is a lesser included offense of bank robbery in violation of 18 U.S.C. § 2113(a), as a matter of law, pursuant to the textual "elements" test adopted by the United States Supreme Court in *Schmuck v. United States*, 489 U.S. 705 (1989).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. Under the Textual "Elements" Test, Bank Larceny Is a Lesser Included Offense of Bank Robbery 6

II. The Bank Robbery and Bank Larceny Provisions Mirror the Common Law, under which Larceny is a Lesser Included Offense of Robbery 11

III. The History of the Statutes at Issue Confirms That Bank Larceny Is a Lesser Included Offense of Bank Robbery 16

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, ___ U.S. ___, 118 S.Ct. 1219 (1998) 20

Bell v. United States, 462 U.S. 356 (1983) 24

Duffy v. State, 56 N.E. 209 (Ind. 1900) 15

Evans v. United States, 504 U.S. 255 (1992) 25

Jerome v. United States, 318 U.S. 101 (1943) ... 18, 19, 25

Morissette v. United States, 342 U.S. 246 (1952) ... *passim*

People v. Clary, 13 P. 77 (Cal. 1887) 15

People v. Kennedy, 11 N.Y.S. 244 (N.Y. Gen. Term 1890) 15

People v. Marcio, 659 N.Y.S.2d 983 (N.Y. App. Div. 1997) 16

Prince v. United States, 352 U.S. 322 (1957) 21, 23, 24

Regina v. Desmond, 3 All E.R. 587 (1964) 15

Regina v. Skivington, 1 All E.R. 483 (C.A. 1967) 14

Rex v. Hall, 172 Eng. Rep. 477 (Gloucester Assizes 1828) 14

Schmuck v. United States, 489 U.S. 705 (1989) 4, 6, 7, 8, 26

Staples v. United States, 511 U.S. 600 (1994) 9, 10

State v. Hatch, 116 P. 286 (Wash. 1911) 15

State v. Perley, 30 A. 74 (Me. 1894) 15

State v. White, 369 S.E.2d 813 (N.C. 1988) 15

United States v. Bailey, 444 U.S. 394 (1980) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Evans, 504 U.S. 255 (1992).....11, 25

United States v. Mosley, 126 F.3d 200 (3d Cir. 1997)..... 1, 7, 10, 22, 23, 25

United States v. Richardson, 687 F.2d 952 (7th Cir. 1982)..... 26

United States v. Turley, 352 U.S. 407 (1957).... 12, 16, 17

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).....5, 9

FEDERAL STATUTES

12 U.S.C. § 588b(a) (1940)..... 22

18 U.S.C. § 641..... 23

18 U.S.C. § 1951..... 25

18 U.S.C. § 2113..... *passim*

18 U.S.C. § 2113(a)..... *passim*

18 U.S.C. § 2113(b)..... 3, 4, 5, 8, 20, 24

26 U.S.C. § 5861(d).....9, 10

28 U.S.C. § 1254(1)..... 1

RULES

Federal Rule of Criminal Procedure 31(c)..... 7

OTHER AUTHORITIES

Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 793 17

Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 20

TABLE OF AUTHORITIES – Continued

Page

1 *Hawkins' Pleas of the Crown* ch. 33, § 1 (1716 ed.) 13

14(2) Digest ¶ 8862 (2d reissue, 1993)..... 13

2 *East's Pleas of the Crown* ch. 16, § 98 at 661-62 (1803 ed.) 13, 14

2 *Russell on Crimes* 98 (4th ed. 1865) 13, 14

4 William Blackstone, *Commentaries* *21..... 10

Black's Law Dictionary 81, 855 (5th ed. 1979).....12, 17

The Fisherman's Case (1528)..... 13

Webster's New Collegiate Dictionary 1138 (2d ed. 1974).....5, 8

OPINIONS BELOW

The opinion of the court of appeals is reported at 126 F.3d 200. (J.A. 39). The opinion of the United States District Court for the District of New Jersey denying Mr. Mosley's post-verdict motions for new trial, for acquittal, and for a downward departure from the otherwise applicable federal sentencing guidelines is unreported. (Pet. App. 15-46).[1]

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1997. (Pet.App.2). The court of appeals denied a petition for rehearing en banc on December 15, 1997. (Pet.App.1). Mr. Mosley filed his petition for a writ of certiorari on December 22, 1997. The petition was granted limited to the question now presented in this brief on March 23, 1998. (J.A. 54). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The "Bank robbery and incidental crimes" provisions of Chapter 103 ("Robbery and Burglary") of Title 18 are the central statutory provisions in this case. They are, in relevant part, as follows:

---

[1] J.A. refers to the joint appendix filed in this Court. Pet.App. refers to the appendix to the petition for writ of certiorari. C.A. App. refers to the appendix filed in the court of appeals below.

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both[.]

18 U.S.C. § 2113 (1984).

STATEMENT OF THE CASE

Petitioner Sylvester Mosley was charged by indictment in the United States District Court for the District of New Jersey with two counts of bank robbery in violation of 18 U.S.C. § 2113(a). (J.A. 2). Count one charged that on November 20, 1995, petitioner did knowingly and willfully, by force and violence and by intimidation, take from a teller approximately $9,334.81 belonging to the First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey. (J.A. 2). Count two similarly charged that on November 9, 1995, petitioner did knowingly and willfully, by

force and violence and by intimidation, take from a teller approximately $2,547.38 belonging to the First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey. (J.A. 3). Petitioner was arraigned on January 17, 1996 and pleaded not guilty to both counts to the indictment. (J.A. 1, C.A. App. 6).

Petitioner was tried before the district court and a jury on March 4 and 5, 1996. (C.A. App. 61-373). At trial, petitioner submitted a written request to the district court to charge the jury on the offense of bank larceny, in violation of 18 U.S.C. § 2113(b). (J.A. 4). On the record, petitioner further interposed this request and objected to the district court's proposed charge to the jury. (J.A. 7-8). Petitioner argued that the jury could credit evidence that would support convictions for bank larceny, could discredit evidence that would support convictions for bank robbery, and that bank larceny is a lesser included offense of bank robbery. (J.A. 7-13). Specifically, petitioner argued that the testimony of the individual bank tellers regarding a taking of money by force and violence or intimidation was controverted by: (1) the testimony of Special Agent Conway of the Federal Bureau of Investigation (FBI) that the videotapes of both incidents did not reveal evidence of force, violence or intimidation (J.A. 8, 12, C.A. App. 167-203, 215-228); (2) the testimony of Special Agent Zimmer of the FBI and local police officer Medwick regarding inconsistencies between the testimony of the tellers and their prior statements (J.A. 8-11, 13, C.A. App. 245-254, 260-262); (3) the testimony of Reverend McDowell, regarding the incident charged in count one of the indictment, that he was a customer directly behind petitioner and that he did not observe evidence of force,

violence or intimidation and that petitioner calmly walked out of the bank (J.A. 13, C.A. App. 265-269); and (4) the testimony of bank teller Maccarotta, regarding the incident charged in count two of the indictment, that she was at the adjacent teller station and did not hear or observe anything. (J.A. 12, C.A. App. 269-273).

The district court denied the requested charge to the jury on bank larceny under 18 U.S.C. § 2113(b). (J.A. 15). Therefore, the district court only instructed the jury on the offense of bank robbery under 18 U.S.C. § 2113(a) as charged in the indictment. (J.A. 17-23).

Petitioner was convicted of the two counts of bank robbery and was sentenced pursuant to the federal sentencing guidelines to 210 months (17½ years) imprisonment on each count to run concurrently, 3 years of supervised release on each count to run concurrently, and a $100 special assessment. (J.A. 24-30, 31-38).

On appeal, the United States Court of Appeals for the Third Circuit affirmed the denial of the requested jury charge. In so doing, the court of appeals held that, as a matter of law, bank larceny in violation of 18 U.S.C. § 2113(b) is not a lesser included offense of bank robbery in violation of 18 U.S.C. § 2113(a). (J.A. 40, 52-53). The court of appeals stated that it was following the textual elements test enunciated in *Schmuck v. United States*, 489 U.S. 705 (1989), to determine whether the elements of the lesser offense were a subset of the greater offense. (J.A. 45-46). However, rather than analyzing the texts of each statute, the court of appeals looked for the appearance, in both statutes, of the exact same words. Not finding the exact words "intent to steal or purloin" – which appear in

the bank larceny provision, but not in the bank robbery provision – the court of appeals held that this requisite *mens rea* element of bank larceny was not a subset or requisite element of bank robbery. (J.A. 46-48). The court of appeals further concluded that this element of intent was not impliedly included by Congress as an element of the bank robbery statute. (J.A. 47).

SUMMARY OF THE ARGUMENT

For three reasons, bank larceny in violation of 18 U.S.C. § 2113(b) is a lesser included offense of bank robbery in violation of 18 U.S.C. § 2113(a). First, an examination of the language of these statutes reveals that Congress employed the dictionary definition of the words "steal" and "purloin," contained in the bank larceny provision, when it wrote the bank robbery provision. That is, 18 U.S.C. § 2113(a) contains the element "takes or attempts to take, from the person" and the word "steal" is commonly defined as "to take the property of another." *See, e.g., Webster's New Collegiate Dictionary* 1138 (2d ed. 1974). The word "purloin" is a synonym of "steal." *Id.* at 937. Therefore, the text of these statutes with respect to these terms, are alternative means of defining the same element. Also, absent a clear and specific statement by Congress that a particular criminal statute does not require a *mens rea*, this element of intent is presumed to exist. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) (collecting and analyzing cases). Because the text of the bank robbery statute is devoid of such an express

statement, "intent" or *mens rea* is presumed to be a requisite element of bank robbery in violation of 18 U.S.C. § 2113(a). The intent to steal is thus an element of both the bank larceny and bank robbery statutes. Simply stated, there can be no robbery without larceny.

Secondly, the above reading of these statutory provisions is consistent with common law definitions, understandings and traditions. The conclusion that larceny is a lesser included offense of robbery has a lineage stretching deep into the history of English and American common law. Congress incorporated this tradition by using the language of the common law in defining bank robbery and bank larceny.

Finally, the legislative history of 18 U.S.C. § 2113, *Bank Robbery and incidental crimes*, and its antecedent statutes, clearly shows that bank larceny is a lesser included offense of bank robbery. To conclude otherwise would require a finding that Congress intended that bank robbery be a strict liability offense requiring no proof of criminal intent – an absurd result. Nowhere in the drafting of the bank robbery statute, the amending of the statute, or the legislative history of the statute has Congress stated such an intention.

ARGUMENT

I. Under the Textual "Elements" Test, Bank Larceny Is a Lesser Included Offense of Bank Robbery.

In *Schmuck v. United States*, 489 U.S. 705 (1989), this Court adopted the "elements approach" to deciding whether a defendant is entitled, under Federal Rule of

Criminal Procedure 31(c),[2] to have the jury instructed on a lesser included offense of the crime charged. Under the "elements test,"

> one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

489 U.S. at 716. This "comparison is appropriately conducted by reference to the statutory elements of the offenses in question. . . . " *Id.* at 718.

Significantly, this Court in *Schmuck* stated that the comparison must be "textual." *Id.* at 720. The Court did not state, however, that the *exact same words* defining an element of the lesser offense must appear in the definition of the element in the greater offense. The critical distinction between a "textual" comparison to determine a "subset," versus an "exact same words" comparison, is the cause of the error in the Third Circuit's opinion below.

In this case, the Third Circuit stated that "[i]t is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the 'intent to steal or purloin.' On the other hand, bank larceny, as defined in subsection (b) includes this element." 126 F.3d 200, 204. (J.A. 46, Pet.App.9). Nevertheless, the bank robbery statute contains the dictionary

---

[2] Rule 31(c) provides, in relevant part, that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." Fed. R. Crim. P. 31(c).

definition of "steal or purloin." That is, 18 U.S.C. § 2113(a) contains the element "takes or attempts to take, from the person" and the word "steal" is commonly defined as "to take the property of another." *See, e.g., Webster's New Collegiate Dictionary* 1138 (2d ed. 1974). The word "purloin" is a synonym of "steal." *Id.* at 937. Therefore, the terms employed in the text of the bank robbery and bank larceny statutes are alternative means of defining the same element.

The element "steal or purloin" contained in the bank larceny statute, 18 U.S.C. § 2113(b), is by definition contained in the bank robbery statute, 18 U.S.C. § 2113(a) ("take or attempt to take, from the person"). Because the only other difference is the "force and violence or intimidation" element unique to bank robbery, bank larceny is a textual subset of – and therefore a lesser included offense of – bank robbery within the meaning of the "elements" test adopted in *Schmuck v. United States*.

The Third Circuit's approach is also inconsistent with this Court's jurisprudence regarding the presumptive implied intent element in federal criminal statutes. The federal bank robbery statute does not, as the Third Circuit noted, contain an express requirement that the intent to steal be proved as an element of the offense. But this is far from the end of the matter. In numerous cases this Court has "interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[3] *United States*

[3] The only exceptions are strict liability statutes "that regulate potentially harmful or injurious items." *Staples v.*

v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) (collecting and analyzing cases). Authorities such as these demonstrate that the Third Circuit's conclusion in this case, according to which bank larceny is not a lesser included offense of bank robbery because the latter lacks *any* intent element, is far outside the mainstream of federal criminal jurisprudence.

For example, in *Staples v. United States*, 511 U.S. 600 (1994), the question presented was whether, to obtain a conviction under section 5861(d) of the National Firearms Act, 26 U.S.C. § 5861(d), the government must prove that the defendant knew that the weapon he possessed had the characteristics that brought it within the prohibition of that section.[4] The Court held that the government must prove such knowledge, reasoning in part as follows:

> Section 5861(d) is silent concerning the *mens rea* required for a violation. . . . Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. On the contrary, we must construe the statute in light of the background rules of the common law, in

United States, 511 U.S. 600, 607 (1994). "Such public welfare offenses have," however, "been created by Congress, and recognized by this Court, in '*limited* circumstances.' " *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978)) (emphasis added).

[4] Section 5861(d) makes it a crime to possess a fully automatic firearm that is not properly registered with the federal government.

> which the requirement of some *mens rea* for a crime is firmly embedded.

511 U.S. at 605. After distinguishing the case law on strict liability offenses, this Court concluded that "the background rule of the common law favoring *mens rea* should govern interpretation of § 5861(d)." *Id.* at 619. In other words, the decision in *Staples* (and similar cases) simply illustrates the basic proposition, long a feature of the common law of crimes, that, "as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all." 4 William Blackstone, *Commentaries* *21.

The bank robbery statute seeks to punish "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank." 18 U.S.C. § 2113(a). In order to conclude that bank larceny is distinguished from bank robbery by the intent to steal, one must first conclude that the bank robbery provision does *not* include this "intent to steal" element.[5] Such a conclusion, however, is directly contrary to the same "background rule of the common law favoring *mens rea*" that was held to govern the decision in cases such as *Staples*, 511 U.S. at 619, and there is nothing

[5] According to the Third Circuit, "the subjective intent of a bank robber to steal is irrelevant." 126 F.3d at 204. (J.A. 47, Pet. App. 9). This conclusion, which makes bank robbery a strict liability offense on a par with the regulatory offenses discussed in *Staples*, 511 U.S. at 607, is absurd.

in the nature of bank robbery to justify such a sharp departure from precedent. General principles of federal criminal statutory interpretation alone, therefore, counsel reversal of the Third Circuit's decision in this case. Moreover, still more specific common law traditions that define the relationship of larceny to robbery compel the same conclusion.

II. The Bank Robbery and Bank Larceny Provisions Mirror the Common Law, under which Larceny is a Lesser Included Offense of Robbery.

This Court has long recognized that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980). Indeed, "[i]t is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning.' " *United States v. Evans*, 504 U.S. 255, 257 (1992) (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990)). This common law background guides the proper construction of federal criminal statutes, and Congress must express its intent to depart from common law definitions in the clearest terms. In the seminal case of *Morissette v. United States*, 342 U.S. 246 (1952), the Court reversed the defendant's conviction on the ground that 18 U.S.C. § 641, an anti-theft statute concerning government property, requires proof of criminal intent despite the statute's lack of an express intent element. As the Court explained in *Morissette*:

> where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were

> attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.

342 U.S. at 263; *see also United States v. Turley*, 352 U.S. 407, 411 (1957) ("[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.") The Third Circuit, however, ignored *Morissette* and its progeny and thus failed to appreciate the significance of the traditional common law language used to define both robbery and larceny.

At common law, robbery was considered an aggravated form of larceny. In his chapter on "Offences Against Private Property," Blackstone defined "simple larceny" as "the felonious taking and carrying away of the personal goods of another." 4 William Blackstone, *Commentaries* *229. He emphasized that "[t]his taking, and carrying away, must also be *felonious*; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa*."[6] *Id.* at *232. Robbery, in turn, was simply an aggravated, or "compound," form of larceny.[7]

---

[6] "Animo furandi" is the "intent to steal," and "lucri causa" means "for the sake of lucre, or gain." *Black's Law Dictionary* 81, 855 (5th ed. 1979).

[7] Blackstone distinguished between simple and "mixed or compound" larceny, the latter of which "has all the properties of the former, but is accompanied with either one or both of the aggravations of a taking from one's *house* or *person*." *Id.* at *239.

Specifically, "violence, or putting in fear, is the criterion that distinguished robbery from other larcenies." *Id.* at *242. Blackstone thus defined robbery as "[o]pen and violent larceny from the person," and "the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear." *Id.* Other treatises on the English common law of crimes recognize these principles.[8]

Both larceny and robbery thus required proof of the same criminal intent to steal. It follows from this principle that, at common law, a charge of robbery could not be sustained where the intent to steal was found lacking. 2 *East's Pleas of the Crown* ch. 16, § 98 at 661-62 (1803 ed.). For example, in *The Fisherman's Case* (1528),[9] a robbery

---

[8] 2 *East's Pleas of the Crown* ch. 16, § 1 (1803 ed.) (larceny and robbery "are intimately connected, the one being included in the other"); *id.* § 124 (robbery, "an aggravated larceny," is the "felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear"); 1 *Hawkins' Pleas of the Crown* ch. 33, § 1 (1716 ed.) (larceny is "a felonious and fraudulent taking, and carrying away, by any Person, of the mere personal Goods of another, not from the Person, nor out of His house, above the Value of twelve pence"); *id.* ch. 34, §§ 1, 3 (robbery, a form of "[m]ixt or complicated larceny," is "a felonious and violent taking away from the Person of another, Goods or Money to any Value, putting him in Fear"); 2 *Russell on Crimes* 98 (4th ed. 1865) ("Robbery from the person appears to be well defined as 'a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear.' "); *id.* 101 ("robbery is an aggravated species of larceny").

[9] 14(2) Digest ¶ 8862 (2d reissue, 1993) (dating *The Fisherman's Case* to 1528).

charge was defeated on the ground that the accused gave money in exchange for the victim's property. According to the report of the case in *East's Pleas of the Crown*:

> A traveler met a fisherman with fish, who refused to sell him any; and he by force and putting in fear took away some of his fish, and threw him money much above the value of it: and judgment was respited, because of the doubt whether the intent were felonious on account of the money given.

Id. Similarly, taking the property of another from his person by violence under a mistaken claim of right is not robbery. 2 *Russell on Crimes* 105 (4th ed. 1865) ("If a party *boná fide* believing that property in the personal possession of another belongs to him, take the property away from such person with menaces and violence, this is not robbery. . . . ") For example, in *Rex v. Hall*, a man indicted for robbing a gamekeeper of trap wire and a captured pheasant was acquitted on the ground that he had a good faith belief that he was recovering his own property. 172 Eng. Rep. 477, 478 (Gloucester Assizes 1828) ("if the Jury think that he took them under a *bona fide* impression that he was only getting back the possession of his own property, there is no *animus furandi*, and I am of the opinion that the prosecution must fail").[10]

---

[10] *See also Regina v. Skivington*, 1 All E.R. 483 (C.A. 1967). In *Skivington*, the court reversed a robbery conviction, reasoning that the accused's demand for his wife's wages from her employer, although made at knife point, was made under a good faith claim of right. According to the court, "larceny is an ingredient of robbery, and if the honest belief that a man has a claim of right is a defense to larceny, then it negatives one of the ingredients in the offense of robbery." *Id.* at 485.

As these authorities make clear, larceny was a lesser included offense of robbery at common law. The English courts have adhered to this view down to the present time. *See, e.g., Regina v. Desmond*, 3 All E.R. 587, 591 (1964) (reducing robbery conviction to larceny conviction, on ground that in "the present case of robbery with violence, the first thing that the prosecution must do is to prove larceny and then go on to prove that that larceny which they have proved has occurred in certain particular circumstances"). Numerous state courts in this country, likewise, recognized this feature of the common law of crimes at the turn of the previous century. *See, e.g., People v. Clary*, 13 P. 77, 78 (Cal. 1887) ("Robbery is larceny, with the element of force or intimidation added."); *Duffy v. State*, 56 N.E. 209, 209 (Ind. 1900) ("It is true, the principal charge against appellant, under the indictment of which he was convicted, is that of robbery. The offense, however, of larceny, is included and involved in that charge."); *State v. Perley*, 30 A. 74, 76 (Me. 1894) ("robbery is characterized by the common law as compound or aggravated larceny"); *People v. Kennedy*, 11 N.Y.S. 244, 246 (N.Y. Gen. Term 1890) ("There can be no robbery without larceny, and hence the accusation of robbery includes that of larceny, the greater including the lesser."); *State v. Hatch*, 116 P. 286, 287 (Wash. 1911) ("Robbery includes larceny; the essential difference between them being the element of force or violence, necessary to establish robbery, but not an essential of larceny."). Finally, the state courts in the United States continue to observe today that larceny is a lesser included offense of robbery. *See, e.g., State v. White*, 369 S.E.2d 813, 817 (N.C. 1988) ("larceny is a lesser included offense of armed robbery"); *People v.*

Marcio, 659 N.Y.S.2d 983, 983 (N.Y. App. Div.) ("petit larceny is a lesser-included offense of robbery in the second degree"), *appeal denied*, 664 N.Y.S.2d 760 (N.Y. 1997).

The common law status of larceny as a lesser included offense of robbery is not open to doubt. Specifically, centuries of case law and commentary confirm that both robbery and larceny require proof of a criminal intent to steal. Congress acted within this tradition when it criminalized bank robbery and bank larceny using the language of Blackstone and other common law authorities.

III. The History of the Statutes at Issue Confirms That Bank Larceny Is a Lesser Included Offense of Bank Robbery.

The bank robbery and bank larceny provisions of 18 U.S.C. § 2113 took their current form in 1948, as part of the overall recodification of federal criminal law in Title 18. The full history of these two provisions consists of three distinct stages: the passage of the original bank robbery act in 1934; the expansion of the act to criminalize bank larceny and unlawful entry in 1937; and the rephrasing of the act as part of the 1948 recodification. At each of these three stages, Congress used the language of the common law to define the offenses of bank robbery and bank larceny. By using this common law language, Congress included the common law intent element of robbery in the statutory offense. *See Turley*, 352 U.S. at 411; *Morissette*, 342 U.S. at 263.

A. Congress Used Common Law Language in The 1934 Act.

Bank robbery was first made a federal crime in 1934. The relevant act, in terms taken virtually verbatim from common law sources such as Blackstone, East, and Hawkins, was as follows:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Act of May 18, 1934, ch. 304, § 2(a), 48 Stat. 793; *cf.* 4 William Blackstone, *Commentaries* *242 (defining robbery as "the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear"). The phrase "feloniously takes," in particular, signifies that criminal intent to steal is an element of the bank robbery offense. *See Turley*, 352 U.S. at 410 n.4 ("felonious" means "having criminal intent"); *Black's Law Dictionary* 555 (5th ed. 1979) ("Felonious taking. As used in the crimes of larceny and robbery, it is the taking with intent to steal."). Congress thus used the language of the common law to create the offense of bank robbery, including the intent to steal as an element thereof. *Turley*, 352 U.S. at 411; *Morissette*, 342 U.S. 263.

The legislative history of the 1934 act supports the conclusion that Congress included the common law intent element in the bank robbery provision. The bill was introduced as one of thirteen measures proposed by

the Attorney General for helping local law enforcement cope better with the interstate activities of organized crime. 78 Cong. Rec. 2946-47 (1934) (introducing bills prepared by Department of Justice, with explanatory letter from Attorney General). According to the Justice Department, the bank bill in particular was "directed at one of the most serious forms of crime committed by gangsters who operate habitually from one State to another in robbing banks." S.Rep. No. 73-537, at 1 (1934) (quoting Department of Justice memorandum); *see also Jerome v. United States*, 318 U.S. 101, 102 (1943) (bank robbery act responded to concerns "over interstate operations by gangsters against banks – activities with which local authorities were frequently unable to cope").

In its original form, the bill criminalized not only bank robbery, but also bank burglary and bank larceny. S. 2841, 73d Cong. §§ 2-4 (1934) (reprinted at 78 Cong. Rec. 5738). The House Judiciary Committee, however, eliminated the larceny and burglary subsections, putting the bill in the form in which it was eventually passed. *See* 78 Cong. Rec. 8132-33 (House debate on and passage of S. 2841); H.R. Rep. No. 73-1598, at 1 (1934) (conference report recommending that "the Senate recede from its disagreement to the amendments of the House"). As Representative Hatton Sumners of Texas explained in debate, "we are going rather far in this bill, since all the property is owned as a rule, by the citizens of the community where the bank is located. The committee was not willing to go further. . . . " 78 Cong. Rec. 8133. The House's emphasis on a narrow act, limited to bank robbery, supports the conclusion that this offense, like its common law analogue, includes an intent element, for absent the

intent element, the definition of bank robbery would be much broader and it would sweep a broader range of conduct within the reach of the federal criminal law.

The jurisdictional provision of the 1934 act sheds further light on Congress' intent in enacting the bank robbery prohibition. According to the act, "[j]urisdiction over any offense defined in this Act shall not be reserved exclusively to courts of the United States." Act of May 18, 1934, ch. 304, § 4, 48 Stat. 793. In other words, state courts – the courts that had long been presiding over common law and state statutory robbery trials – could try federal bank robbery cases. As the House report on the bill explained, after noting the jurisdictional provision,

> [t]here is no intention that the Federal Government shall supersede the State authorities in this class of cases. It will intervene only to cooperate with local forces when it is evident that the latter cannot cope with the criminals.

H.R. Rep. No. 73-1461, at 2 (1934). This jurisdictional provision, present in the bill from its inception, manifested Congress' intent to frame a criminal measure that would assist – not displace – local law enforcement efforts. This intent to assist, rather than displace, the states is furthered by a construction of bank robbery that incorporates, rather than rejects, the longstanding intent element of common law robbery. *See Jerome*, 318 U.S. at 105 ("[W]here Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute."). The Third Circuit's more expansive definition of bank robbery, according to which no criminal intent need be proved, simply ignores

this legislative history and frustrates congressional intent.

B. The 1937 Act, Like The 1934 Act, Relies on Common Law Language.

In 1937, Congress amended the 1934 measure to criminalize bank larceny and unlawful entry of a bank. *See* Act of Aug. 24, 1937, ch. 747, 50 Stat. 749 (adding larceny and unlawful entry offenses). These additional prohibitions, like the bank robbery statute, used the language of the common law: "whoever shall take and carry away, with intent to steal or purloin, any property or money"; "whoever shall enter or attempt to enter any bank . . . with intent to commit in such bank . . . any felony or larceny." *Id.* The terms of the current statute are essentially the same. *See* 18 U.S.C. § 2113(b) ("Whoever takes and carries away, with intent to steal or purloin . . . "). Importantly, the title of the 1937 act, "AN ACT To amend the bank-robbery statute to include burglary and larceny," also expressly adopts the nomenclature of common law crimes. This usage in the act's title provides further support for the conclusion that these offenses include the common law intent element. *See Almendarez-Torres v. United States*, ___ U.S. ___, 118 S.Ct. 1219, 1226 (1998) (" 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute") (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)). Finally, the definition of bank robbery – "[w]hoever . . . feloniously takes" – remained unchanged in the 1937 act. Act of Aug. 24, 1937, ch. 747, 50 Stat. 749.

The 1937 amendment, like the anti-robbery statute before it, was prompted by a request of the Attorney General. According to the Attorney General:

> [t]he fact that the [1934] statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear – necessary elements of the crime of robbery – and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

H.R. Rep. No. 75-732, at 1-2 (1937) (reprinting letter from Attorney General); *see also* S. Rep. No. 75-1259, at 1-2 (1937) (reprinting same letter). The facts the Attorney General summarized clearly constitute common law larceny, but not robbery. The purpose of the bill was thus to create, among other things, the lesser included offense of bank larceny. *See Prince v. United States*, 352 U.S. 322, 327 (1957) ("The only factor stressed by the Attorney General in his [1937] letter to Congress was the possibility that a thief might not commit all the elements of the crime of robbery. *It was manifestly the purpose of Congress to establish lesser offenses.*") (emphasis added).

C. The 1948 Recodification Retained Intent Elements of Larceny and Robbery.

As this Court has observed, "[t]he 1948 Revision was not intended to create new crimes but to recodify those then in existence." *Morissette*, 342 U.S. at 269 n.28. The bank robbery and bank larceny provisions were recodified as subsections (a) and (b), respectively, of 18 U.S.C. § 2113, and in substantially the same terms they have today. Act of June 25, 1948, ch. 645, § 2113, 62 Stat. 683, at 796-97 (1948).

The textual change of note for the present case is the deletion of the modifier "feloniously" from the bank robbery provision. *Compare* 12 U.S.C. 588b(a) (1940) ("Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another . . . ") *with* 18 U.S.C. § 2113(a) (1948) ("Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . "). As was noted above, the modifier "feloniously" is the common law term signifying the element of criminal intent. In this case, the Third Circuit took the deletion of "feloniously" as possible "support for the proposition that intent was not conceived as an element of the crime." 126 F.3d at 205 (J.A. 50). The Third Circuit's reasoning is contrary both to the legislative history of the 1948 recodification and to this Court's precedent.

First, the Third Circuit's reasoning cannot be reconciled with the decision in *Morissette*. *Morissette*, like the case at bar, involved a statute in which the expressed intent element was deleted from the text as part of the

1948 recodifiction. *See Morissette*, 342 U.S. at 266 n.28 (reviewing legislative history of 18 U.S.C. § 641 and its antecedents). As was explained above, *Morissette* concluded that the intent element remained part of the anti-theft statute at issue, holding that Congress must do more than fail to mention criminal intent if it wishes to delete the intent element from the federal version of a common law crime. *Id.* at 263 ("In such case, absence of contrary direction [from Congress] may be taken as satisfaction with widely accepted definitions, not as a departure from them."). By parity of reasoning, the deletion of the common law criminal intent term "feloniously" from the statute at issue here cannot, by itself, be construed as an elimination of the intent element from the antecedent bank robbery statute. The Third Circuit essentially turns *Morissette* on its head, reasoning that Congress should have expressed its desire to *preserve*, rather than *eliminate*, the element of criminal intent from the bank robbery statute. *See Mosley*, 126 F.3d at 205. ("Congress' failure to give some indication that intent was to remain an element of bank robbery may provide support for the proposition that intent was not conceived as an element of the crime.") (J.A. 50). This inversion of *Morissette* cannot be sustained.

This Court's decision in *Prince v. United States*, 352 U.S. 322 (1957), is equally problematic for the respondent in this case. In *Prince*, the Court rejected the government's contention that, under 18 U.S.C. § 2113, "unlawful entry and robbery are two offenses consecutively punishable in a typical bank robbery situation." *Id.* at 324. Mr. Prince, having been convicted of both unlawful entry and bank robbery, was sentenced to 20 years for robbery and 15

years for unlawful entry, to be served consecutively. *Id.* at 324. After analyzing the legislative history of section 2113, *id.* at 325-28, the Court concluded that the unlawful entry offense merges with the completed robbery. Critical to the Court's conclusion was the premise that both unlawful entry and robbery share the same criminal intent to steal:

> the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather *the heart of the crime is the intent to steal. This mental element merges into the completed crime* if the robbery is consummated.

Id. at 328 (footnote omitted) (emphasis added). Of course, the intent to steal at the "heart" of unlawful entry cannot merge into the offense of bank robbery unless bank robbery itself requires the intent to steal. The Third Circuit made no effort to reconcile its decision with the result or the reasoning of *Prince*.[11]

---

[11] The decision in *Bell v. United States*, 462 U.S. 356 (1983), does nothing to reduce the force of *Prince* in this case. In *Bell*, the Court held that the "take" element of bank larceny, 18 U.S.C. § 2113(b), is satisfied by proof that the defendant took the property by false pretenses, a method of taking that was outside the scope of larceny at common law. 462 U.S. at 358-62. There is, of course, nothing incongruous in concluding that one aspect of a federal criminal offense has been broadened from its common law confines, while another aspect of the very same offense

Second, the legislative history of the 1948 recodification indicates that Congress did not eliminate the intent element from the bank robbery provision. According to the comprehensive House committee report that accompanied the 1948 recodification, the only significant change in section 2113 was to the unlawful entry provision of subsection (a). H.R. Rep. No. 80-304, at A135 (1947). This change – replacing the phrase "any felony or larceny" with "any felony affecting such bank and in violation of any statute of the United States, or any larceny" – simply codified the holding in *Jerome v. United States*, 318 U.S. 101, 108 (1943) (The term "felony" in 1937 act embraces only federal felony offenses and not felonies proscribed by state law and thereby avoided confusion over possibly incorporating state felony provisions by reference). *See* H.R. Rep. No. 80-304, at A135 ("Change conforms with *Jerome*"). Other changes to the recodified provisions, such as the deletion of "feloniously" from the robbery provision, are described merely as "changes in phraseology." *Id.* Moreover, the deletion of "feloniously" from section 2113 is attributable to one of the general goals of the 1948 recodification – namely, eliminating unnecessary felony classifications. As the Seventh Circuit explained in *United States v. Richardson*:

---

continues to hew to the common law definition for that offense. For example, this Court recently construed the Hobbs Act, 18 U.S.C. § 1951, in just this manner. *See Evans v. United States*, 504 U.S. 255, 263-64 (1992) ("Although the present statutory text is much broader than the common law definition of extortion . . . the portion of the statute that refers to official misconduct continues to mirror the common-law definition.") (footnote omitted).

> Generally, in the 1948 codification of the criminal statutes an effort was made to avoid redundant use of the words "felony" and "misdemeanor" and the unnecessary use of the words "and on conviction thereof" where they preceded "shall be punished." Most references to "felony" and "misdemeanor" were considered redundant because § 1 of Title 18 [now repealed] defined them for purpose of the entire code.

687 F.2d 952, 957 (7th Cir. 1982) (internal citation omitted). Contrary to the Third Circuit's view, Congress clearly did not intend to eliminate the requirement that the intent to steal be proved in a bank robbery case by eliminating the modifier "feloniously" from subsection (a) of section 2113.

In sum, bank larceny is a lesser included offense of bank robbery. Although the bank robbery statute does not require proof of intent to steal in those very words, Congress clearly incorporated the traditional common law element of intent in defining bank robbery. Bank larceny requires proof of this same intent to steal. Therefore, the elements of bank larceny are a textual subset of the elements of bank robbery, and therefore, as a matter of law, a lesser included offense within the "elements" test. *See Schmuck*, 489 U.S. at 716.

CONCLUSION

For the foregoing reasons, Mr. Mosley respectfully requests that the judgment of the Third Circuit be reversed and the case be remanded for further proceedings.

Respectfully submitted,

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

RICHARD COUGHLIN
DONALD J. MCCAULEY*
Federal Public Defender
District of New Jersey
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347

Counsel for Petitioner Sylvester Mosley

**Counsel of Record*